No. 539

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IN THE

Supreme Court of the United States

IN THE MATTER

—OF—

MANHATTAN STEAM BAKERY, INC.,
Bankrupt,

IRVING J. WHITE, appearing specially,
Petitioner,

IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN and MANHATTAN BAKERIES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN ITS SUPPORT.

JOHN P. MCGRATH,
Counsel for Appellant,
appearing specially.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

IN THE MATTER

—OF—

MANHATTAN STEAM BAKERY, INC.,
Bankrupt.

IRVING J. WHITE, appearing specially,
Petitioner,

IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN and MANHATTAN BAKERIES, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, IRVING J. WHITE, appearing specially for the purposes herein set forth, represents:

I. That the United States Circuit Court of Appeals for the Second Circuit, on June 9, 1941, unanimously affirmed an order of the United States District Court for the Eastern District of New York, made by the Honorable Grover M. Moscowitz, District Judge, confirming the report of a Referee in Bankruptcy.

II. That said order of the District Court held null and void a written contract entered into between your petitioner

and the bankrupt, Manhattan Steam Baker, Inc., on April 26th, 1937, pursuant to which your petitioner installed in bankrupt's premises, bakers' machinery of the contract price of $12,150.00 upon which $9,400.00 with interest from September 1, 1937, remains unpaid and under which contract the bankrupt had been in default since September, 1937.

III. Pursuant to notice, the written offer (both set forth as to material parts in the appendix) of Nathan Pearlstein to purchase all of bankrupt's assets subject to various encumbrances, was accepted at a creditors' meeting.

It must be noted that

> "* * * subject to * * * conditional bills of sale and foreclosure 'proceedings thereof * * *'"

in both the offer and notice of sale refer to petitioner's contract and its pending foreclosure, that being the only one under foreclosure and the only one existing beside one on bankrupt's trucks, which was neither in default nor under foreclosure and upon which only a nominal balance remained unpaid.

Thereupon, and *before* the order confirming the sale was made, petitioner applied to the District Court to so modify its existing stay as to permit him to proceed in his pending State Court foreclosure, but before the application came on for argument, the order confirming the sale was entered, and therefore, when the motion came before the District Court to be heard, petitioner asked leave to withdraw his said application, since by the entry of the order of confirmation, said sale became final, the purchaser possessed of the chattels in question and the possession of the District Court terminated.

By the judicial confirmation of the sale, the District Court voluntarily and finally parted with possession of the *res* and was without further power or jurisdiction to grant any relief to petitioner. *Then* he was compelled to and did institute a new suit in the State Court against said Pearl-

stein (who was a mere dummy) and his transferee, the new corporation Manhattan Bakeries, Inc., for the replevin of his chattels.

However, notwithstanding the sale subject to petitioner's contract and the foreclosure thereof, and the judicial confirmation of such sale, the District Court denied petitioner leave to withdraw and referred the matter to the Referee in Bankruptcy in charge of the proceeding to hear and report.

Appearing specially and, at every stage, protesting the lack of jurisdiction, petitioner was compelled to oppose the trustee's petition to have said contract declared null and void for the alleged reason that the same had been prematurely refiled. The New York State Personal Property Law (the material portions of which are found in the appendix) requires refiling "within thirty days next preceding the expiration of "each period" while petitioner's contract was actually refiled forty-five days before three years had expired from its original filing. No order was made, before (or after) the sale, either permitting a sale of bankrupt's assets free and clear of liens or preserving to the trustee any claim or lien of any kind and the sale was actually made expressly subject to petitioner's contract as shown by excerpts from the minutes of the creditors' meeting of June 19, 1940, hereinafter quoted.

The trustee made no effort to prevent transfer or encumbrance of the chattels, but petitioner, by temporary stays obtained in his State Court action and finally by actual replevin, safeguarded the property. On August 24, 1940, the Sheriff of Queens County levied replevin on the chattels against said Nathan Pearlstein and Manhattan Bakeries, Inc., the new corporation now in actual, physical possession and ever since the said Sheriff has had constructive possession, under the due process of the State Court, in which action petitioner provided the statutory bond of $12,000. Not until this time, when the free use of this expensive equipment by Manhattan Bakeries, Inc., was about to be terminated, did the Trustee take any steps to safeguard the prop-

erty, and then he obtained a stay against actual removal of the machinery in the Federal Court against petitioner and said Sheriff, insuring to this new corporation the continued free use thereof.

IV. The assignment of errors filed below on behalf of petitioner presented, among others, the following questions which were argued before the Circuit Court of Appeals:

(a) That said District Court had jurisdiction neither of the person of your petitioner nor of the property involved in this proceeding and that the same is in contravention of Article V in Addition to, and Amendment of, the Constitution of the United States of America, in that your petitioner was thereby deprived of property, without due process of law.

(b) That the order of the District Court was against the conceded facts and against the law.

(c) That the order confirming said bankruptcy sale was a legal adjudication of the validity of petitioner's contract and that the District Court voluntarily surrendered its possession of, and jurisdiction over, said personal property prior to petitioner's application to withdraw from said District Court, and that the State Supreme Court, by its Sheriff, has possession and sole jurisdiction in the premises.

(d) That, in any event, bankrupt had no leviable interest in the property which the trustee could acquire, which raised the question as to whether or not the so-called Chandler Act (amendment of the Bankruptcy Act of 1938), was retroactive in respect to petitioner's contract.

(e) That the bankruptcy sale was made expressly subject to petitioner's contract and pending foreclosure thereof, without reservation.

V. The concurring opinion (in its substance *dissenting*) indicates the infirmity of the affirming decision below, *i. e.*,

"* * * It seems to me a constrained construction of the contract of sale to Pearlstein to hold that it meant a purchase subject to an *invalid* lien or claim. If that were all, the dispute here would be between the conditional vendor and the purchaser as present owner and beyond the bankruptcy jurisdiction. But the sale contract could be held on the evidence to be the product of mutual mistake, * * *"

But, there was no special proceeding or legal action to reform the sale or to correct any mistake, mutual or otherwise. Certainly, mistake, if any, was one of law, not of a fact and anything but mutual.

Unlike chattels mortgages, conditional contracts create questions of *title* not of *lien*. Here can be no question of *lien* though the opinions all speak of a "lien" or an *invalid* lien retained by the trustee or "an interest in the chattels equivalent thereto".

White has no *lien;* he has *title*. The purchaser bought expressly subject to White's *title*, the right to pay the balance and thus to acquire title. There is no equity of redemption since less than 50% had been paid so the purchaser acquired none but merely the right to pay the balance and make good the default. He did not *assume* the contract but took subject to it and "foreclosure thereof" pending at and before bankruptcy.

The Trustee sold all his *title;* there is not and never was a *lien*. If White's contract were, in fact, invalid, the reservation of *title* would be invalid. What has the Trustee now to sell? A purely fictitious *lien?* What can a prospective purchaser now acquire from the Trustee? What rights, if any, has he against the original purchaser who has already acquired the Trustee's *title*, subject *not* to any lien but to White's *title?*

It is the bankrupt's estate that is to be administered here; not White's estate.

QUESTIONS PRESENTED.

A. Did the District Court have jurisdiction of the person of petitioner or of the *res*, concededly in the constructive possession of the State Court, by its Sheriff?

B. Is the Trustee a creditor who acquired "by attachment or levy a lien" on the *res*, as defined in the New York Personal Property Law (Sec. 65) and is the Chandler Act amending the Bankruptcy Act retroactive in this respect?

C. Is there legal authority for subrogation of the Trustee to petitioner's contracts rights in this case and, if so, may it be had by way of this summary proceeding?

D. Had the bankrupt any leviable interest in the *res* which the Trustee could acquire?

E. Could the sufficiency of the refiling of petitioner's contract be questioned by the Trustee after the sale and without showing the existence of a creditor without actual notice thereof, and was it, in fact, sufficient?

F. Was the order confirming the bankruptcy sale *res adjudicata* as to the validity of petitioner's contract?

G. Was the bankruptcy sale made expressly subject to White's contract and its pending foreclosure, without reservation of any claims on behalf of the bankrupt estate?

VI. The following are the questions presented for review by this Court:

1. Did the District Court have jurisdiction of either the petitioner or the property in question in making its adjudication?

2. Is the 1938 amendment of the Chandler Act (Section 70 (c) U. S. C. A., Title 11, Sec. 110 (c)) referring to

creditors then (at bankruptcy) holding a lien, retroactive in so far as said amendment adds the words: "whether or not such creditor actually exists"?

3. Is the trustee here such a creditor as acquired "by attachment or levy a lien" in the absence of proof on his behalf, that at least one such creditor actually exists?

4. In the circumstances of this case is a summary proceeding "in bankruptcy" authorized by law?

5. Had the bankrupt, on filing of the bankruptcy petition, any leviable interest in the *res* under New York law?

6. Is the order confirming the bankruptcy sale *res adjudicata* as to the validity of petitioner's contract?

7. May the sufficiency of the refiling of petitioner's contract be questioned in this proceeding and, if so, was such refiling sufficient under the law of the State of New York?

REASONS FOR GRANTING THE WRIT.

VII. Your petitioner respectfully urges that, as shown above (and as will more fully be urged in the brief submitted herewith), the Circuit Court of Appeals in this cause has rendered a decision in conflict with applicable decisions of this Court and with the decision of another Circuit Court of Appeals on the same matter; has decided an important question of constitutional law in conflict with the weight of authority; has improperly given the Chandler Act retroactive effect in conflict with *Ginsberg* v. *Lindel*, 107 F. (2) 721, C. C. A. 8, and erroneously determined the questions as to jurisdiction and burden of proof and that the order of affirmance presented for review has so far departed from the

accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision.

WHEREFORE petitioner, appearing specially herein as heretofore, prays that a writ of certiorari may issue out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and all proceedings had herein and that the order of the said Circuit Court of Appeals affirming the order of the District Court in this cause may be reversed and that the petitioner may have such other, further or different incidental relief as may be just in the premises.

Dated, July 21st, 1941.

IRVING J. WHITE,
Petitioner.

By
JOHN P. MCGRATH,
Counsel for Petitioner.

AFFIDAVIT OF IRVING J. WHITE.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK,

STATE OF NEW YORK; COUNTY OF NEW YORK.

IN THE MATTER

—OF—

MANHATTAN STEAM BAKERY, INC.,
Bankrupt.

IRVING J. WHITE, appearing specially,
Petitioner,

IRVING STEINMAN, as Trustee, NATHAN PEARLSTEIN and MANHATTAN BAKERIES, INC.,
Respondents.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

IRVING J. WHITE, being duly sworn, says:

I am the petitioner appearing specially herein. I have read the foregoing petition by me subscribed and know the contents thereof. The facts therein stated are true to the best of my knowledge, information and belief.

IRVING J. WHITE.

Sworn to before me this
21st day of July, 1941.

ALMA WHITE,
Notary Public,
New York County, No. 156,
My commission expires March 31, 1942.

(Notarial Seal)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that, in my opinion, it is well founded and the cause is one in which the petition should be granted.

Dated, July 21st, 1941.

JOHN P. McGRATH.